



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL CASE NO. 40 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

P M G.....ACCUSED

JUDGMENT

P M G, the accused person is before this court on the information of the Honourable Attorney General dated 27th July, 2009 duly charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 12th July 2009, at [particulars withheld] area, in Murang'a South District within Central Province, the accused, murdered his stepson **K M**, who was aged ten (10) years.

The prosecution's case was supported by the evidence of seven witnesses. The star witnesses who testified in support of the prosecution's case are namely: **D I** (P.W.5) and **Dr. Chris Kimathi Mugambi** (P.W.7). It is the evidence of **M W** (P.W.1), that the accused is her husband. They had four children in their seven years of marriage. It would appear the couple had a domestic quarrel which prompted P.W.1 to leave the matrimonial home. She took with her, two children, leaving behind **K M**, deceased and **D I** (P.W.5). The accused was not the biological father of the deceased. It is the evidence of P.W.1 that the accused had threatened to kill the deceased at some stage before she left for her parents. On 13th July 2009, P.W.1 received a phone call informing her that her son (deceased) was critically ill having fallen down from a tree. She rushed home, only to learn that **K** was dead. **P M** (P.W.2) said he gave the accused through his brother, **C N** money to transport the deceased to hospital for treatment on 11th July, 2009. At 4.00am on the same date P.W.3 said he was woken up by the accused and his brother **C N** (P.W.3) with a request to assist them to transport the deceased to hospital since his condition had deteriorated. P.W.2 took them to hospital using a motorbike. He said he observed the deceased was in great pain. P.W.3 told this court that he together with his brother (accused) took the deceased to Maragwa Rural Hospital for treatment where they were referred for specialized treatment at Murang'a District Hospital. The accused and P.W.3 took the child home but were forced to wake up P.W.2 at 4.00am when the deceased's condition became worse. The deceased was pronounced dead on arrival at Murang'a District Hospital. It is the evidence of Senior Sergeant Christopher Obath (P.W.4) that P.W.1 requested the police to have a postmortem done on the deceased's body since she suspected that there was foul play in the death of the deceased. An autopsy was done by **Dr. Chris Kimathi Mugambi** (P.W.7) who formed the opinion that the cause of death was severe asphyxia due to strangulation. The results of the postmortem prompted the police to arrest the accused at the Murang'a District Hospital Mortuary as the prime suspect for murder. It is the evidence of **D I** (P.W.5), the deceased's brother that he saw the

accused hold and twist the deceased's neck to strangle him. He said he witnessed the accused tie a rope around the deceased's neck in their bedroom while he was asleep. P.W.5 said he heard his deceased's brother tell the accused not to strangle him.

When placed on his defence, the accused gave unsworn testimony in which he denied committing the offence. He did not summon any independent witnesses to further buttress his defence. He stated in his evidence that in the morning of 11th July 2009, he left to do some manual work and that during the day he received a phone call from his brother informing him that his son K M (deceased) was injured having fallen down from a tree. The accused arrived home at 6.30pm and took the deceased to hospital for treatment using a motor cycle where the child was treated and told to go back the next morning for further observation and treatment. The accused said the child became too sick that night prompting him to call for transport assistance from the owner of the same motorbike. The child was pronounced dead on arrival at the hospital. The accused averred that D I lied to court when he stated in court that he had seen him strangle the deceased while they were asleep in bed. He blamed his wife for using this case to settle scores.

In order for the offence of murder to be established two ingredients must manifest themselves from the evidence. First, there must be unlawful death known in latin as *actus reus*. Secondly, there must be malice aforethought known in latin as *mens rea*.

There is no doubt, that K M died. The pathologist who performed a postmortem on the deceased's body concluded that the cause of death was severe asphyxia secondary to strangulation. The question which must be answered is who strangled the deceased. It is the evidence of P.W.5 that the accused strangled the deceased. He said he saw the accused hold the deceased's neck to strangle him. P.W.5 further claimed that the accused used a rope to strangle the deceased. P.W.5 claimed he heard the deceased plead with the accused not to strangle him. He said the lamp was on. P.W.5's evidence has raised several pertinent issues which must be analysed together with evidence as a whole. P.W.5 is a child of tender age and that is why this court had to conduct *voir dire* inquiry before allowing him testify without oath. Under **Section 124** of the **Evidence Act**, the evidence of P.W.5 required corroboration. I can for sure say his evidence was corroborated by that of Dr. Chris Mugambi (P.W.7). The remaining issue is whether the evidence of P.W.5 is credible and reliable. It is his evidence that he shared a bed with the deceased on the fateful night and that the accused came at night, lit the lamp and begun to strangle the deceased by holding his neck and by using a rope. I find this piece of evidence unbelievable because it does not make sense for the accused to do such an act in a careless and carefree manner. How would one tell two children to share a bed and at night visit their bedroom put on lights and begin to strangle one as the other look on., there is uncontested evidence by P.W.2 and P.W.3 that the deceased was rushed twice to hospital at night by the accused. From the evidence of the accused and the two witnesses, it is clear that the accused made frantic efforts to save the life of the deceased. That is not the conduct of a person who wanted to see the deceased dead. There is cause not to believe the evidence of P.W.5 in view of his admission in examination that he currently lives with his mother (P.W.1). In fact, P.W.5 said he was told by his mother what to come and say in court. In fact, P.W.1 was the one who brought P.W.5 to court the morning he testified. It is the evidence of P.W.1 that she had serious domestic differences with the accused leading to their separation. P.W.1 further stated that the accused had previously threatened to kill her and the deceased. She also alleged that the deceased was not the biological son of the accused. I think it is right to infer that it is possible that P.W.1 was likely to coach P.W.5 to testify against the accused to settle scores arising from their domestic feuds. For the above reasons, I am unable to rely on the evidence of P.W.5. There is therefore doubt whether the accused was indeed the deceased's killer. In sum, the ingredient of *actus reus* was not established beyond reasonable doubt.

The remaining question is whether malice aforethought manifested itself from the conduct of the accused. P.W.1 purported in her evidence to aver that since the deceased was not the accused's biological son, then the accused planned to murder him. In an ideal situation this could be so but unfortunately in this case P.W.1 and the accused being husband and wife had serious irreconcilable differences which may induce either to make false allegations against the other for purposes of revenge. Again, I find that the ingredient of *mens rea* cannot be attributed to the accused.

In the end, I find that the ingredients establishing the offence of murder were not proved. Consequently, I find P M G not guilty of murder. He is hereby acquitted hence he should be released from custody forthwith unless lawfully held.

Dated, Signed and delivered in open court this 20th day of February, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. A.Kariuki for Accused

Mr. Cheboi for Director of Public Prosecution